88-666

Supreme Court, U.S.
FILED
OCT 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

ERNESTINE FORREST,

Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION, DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORPORATION, WHITE CORPORATION, RED CORPORATION, ARMAND HAMMER

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals was in error in rescinding its Memorandium filed January 21, 1988, reversing and remanding a dismissal to the District Court, "in view of the posture of these proceedings," and replacing that decision with its Amended Memorandum newly based upon the use of erroneous facts and the Court of Appeals becoming the trier of fact (as well as using incomplete law) to affirm the original District Court dismissal?

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OPINIONS BELOW

None of the opinions below were reported. This includes the Memorandum of the three-judge panel of the United States Court of Appeals for the Ninth Circuit reversing and remanding, filed January 21, 1988; the order of the three-judge panel of the Court of Appeals for the Ninth Circuit amending its Memorandum and denying Respondents' petition for rehearing and rejecting the suggestion for a rehearing en banc, filed May 25, 1988; the Amended Memorandum of the three-judge panel of the Court of Appeals for the Ninth Circuit,

affirming the dismissal, filed May 25, 1988; and, the order of the three-judge panel of the Court of Appeals for the Ninth Circuit denying Petitioner's petition for rehearing and rejecting the suggestion for a rehearing en banc, filed July 20, 1988.

JURISDICTION

The three-judge panel of the Ninth Circuit filed its Memorandum reversing and remanding, on January 21, 1988. On May 25, 1988, this three-judge panel denied Respondents' petition for rehearing and rejected the suggestion for a rehearing en banc but issued an Amended Memorandum affirming the dismissal. On July 20, 1988, this three-judge panel denied Petitioner's petition for rehearing and rejected the suggestion for rehearing en banc. On August 10, 1988, Petitioner's subsequent filing which had been labeled Petition for Rehearing was returned to her. In August, 1988 the United States Court of Appeals for the Ninth Circuit prepared a judgment stating that it was filed and entered May 25, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Fed. Rules Civ. Proc. Rule 4(j), 28 U.S.C.:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Fed. Rules Civ. Proc. Rule 5(b), 28 U.S.C.:

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

STATEMENT OF THE CASE

A. The Factual Background of This Case.

Petitioner was a tax and corporate attorney with an LL.M. (Taxation). In her initial years of practice Petitioner had been admitted to the United States District Court for the Ninth Circuit but Petitioner had never practiced in or done work as a trial attorney. Petitioner had never appeared in court on the state or federal level. Petitioner retained counsel in October, 1982, after notice from Respondents that her employment as a tax and corporate attorney would be terminated by layoff. Respondents alleged that the layoff was "due to economic circumstances." In fact, in five years of employment with Respondents, after being recruited from a local law firm as the first female or minority attorney for Respondents at corporate headquarters, Petitioner had suffered discrimination in compensation, terms and conditions of employment and work assignments, which limited her marketability. As she fought

against these conditions, Petitioner's position was terminated by Respondents by layoff.

Respondents admitted in writing that Petitioner did not lose her job for cause or incompetence. Respondents also admitted that Petitioner alone had consistently been placed in offices on separate floors and away from the other attorneys.

Other professionals employed by Respondents at corporate headquarters were not laid off, including those doing similar work and with less seniority than Petitioner. Simultaneous with the layoff of Petitioner "due to economic circumstances," Respondents initiated the acquisition of another oil company at a cost of $3.4 to $3.8 Billion. Attorneys were needed and were employed by Respondents to work on the acquisition and other matters. Respondents replaced Petitioner, the first female or minority attorney hired at corporate headquarters, with a non-minority male attorney.

The counsel retained by Petitioner for litigation, Robert Bezemek, Esq. of Oakland, California, engaged in negotiations with Respondents' counsel, Irell & Manella of Los Angeles, California, from October, 1982 until June, 1983. In December, 1982, Mr. Bezemek had written to Respondents describing the legal bases for Petitioner's claims against Respondents. Mr. Bezemek set forth a February 1, 1983 deadline, after which he would initiate legal proceedings. Respondent Gerald Stern wrote to Mr. Bezemek and stated on behalf of Respondent Occidental Petroleum Corporation that he would waive certain EEOC statutes of limitation rights to facilitate a meeting with the counsel for Petitioner.

Mr. Bezemek advised Petitioner that in the meeting with Respondents and their counsel in February, 1983, Respondents threatened to give bad references regarding Petitioner despite stating earlier that Petitioner's layoff was not for cause or incompetence. Mr. Bezemek also stated that he had been advised by Respondents and their counsel that his

practice would be jeopardized by engaging in litigation with defendants of such financial and other resources. Mr. Bezemek delayed in initiating legal proceedings.

In June, 1983, Mr. Bezemek finally wrote to Irell & Manella, counsel for Respondents, and stated that they should expect the filing of a lawsuit. In the letter, Mr. Bezemek asked Irell & Manella to accept service of process on behalf of Respondents. Irell & Manella ignored Mr. Bezemek and did not respond. Thereafter, in July, 1983, Petitioner received a letter from Mr. Bezemek in which he abandoned Petitioner's case, provided a complaint which he had prepared for an In Pro Per filing and advised Petitioner to complete administrative proceedings already initiated and to file but not serve the complaint.

Petitioner had paid several thousand dollars to attorney Bezemek. Petitioner had now been without full time employment for approaching a year. Petitioner was unsuccessful in finding other counsel or other employment under her financial and employment circumstances. Petitioner was eventually without full time employment from 1982 to the end of 1985 and had income which dropped from the $40,000's to $9,005.53 in 1983 (including unemployment benefits),. to $6,934.77 in 1984 and to approximately $10,000 in 1985.

With what was largely pro bono assistance from attorney Dan Stormer of Los Angeles, California, Petitioner completed the administrative proceedings which had been initiated by attorney Bezemek. Dan Stormer did not agree to take on Petitioner's case as attorney of record. Respondents were required to present a defense in the administrative proceedings conducted under state and federal employment laws. Petitioner received a right to sue letter from the Equal Employment Opportunity Commission ("EEOC"). Respondents were provided with a copy of the right to sue letter by the EEOC.

A timely complaint was filed in the United States District Court for the Central District of California on November 20, 1984, with jurisdiction invoked under 28 U.S.C. §§ 1343 and 2201. Claims for relief were based upon Title VII of the Civil Rights Act of 1984, as amended; the Equal pay Act of 1963, as amended; 42 U.S.C. §§ 1981, 1983, 1985, 1986; and, the court's pendant jurisdiction. In accordance with instructions from various attorneys who did not commit to serving as attorney of record, the complaint was filed by Ernestine Forrest, in pro se, but not served upon the defendants at that time.

On November 20, 1984, immediately after filing the complaint in the United States District Court in the Central District of California, Petitioner departed on a job hunting trip in the States of Texas and Colorado, in an effort to gain income to finance counsel for her case. Petitioner's aggressive job hunting efforts were frustrated by the refusal of Respondents to talk to potential employers. However, in October, 1985, Petitioner obtained temporary three month employment in the State of Colorado, which eventually continued beyond the three month period. When the employment continued, in February, 1986, Petitioner travelled to the State of California to meet with potential counsel with whom she had conferred by telephone. Preliminary to the meeting with the counsel, attorney John Urban of Los Angeles, California, Petitioner travelled to the United States District Court where she learned that her case had just been dismissed. Petitioner had not previously been provided with notice of the pending dismissal. The order accomplishing the dismissal, filed on February 28, 1986, stated the following:

> This action having been commenced on November 20, 1984, and no service having been accomplished *pursuant to Rule 35, FRCivP* (emphasis added), IT IS ORDERED that this action is hereby dismissed.

B. The Proceedings in the District Court.

Upon learning of the dismissal of her action, Petitioner met with the Law Clerk for the assigned United States District Judge, named Mrs. T. Saunders. Petitioner was instructed to prepare a motion to have the assigned judge review the dismissal. When attorney John Urban indicated that he could not assist Petitioner until her case had been reinstated, Petitioner hastily prepared a document and on March 10, 1986, Petitioner served on Respondents, at the corporate headquarters of Respondent Occidental Petroleum Corporation, a motion to reconsider, revoke, vacate and set aside the order of dismissal pursuant to its own initiative, Rule 59(e) or other applicable rule. An emphasis was placed upon relief under Rule 60, Rule 4(j) and Rule 6(b).

Petitioner had no previous court experience and was untrained in litigation. After March 10, 1986, and in the immediately following days and weeks, from her location in the State of Colorado, Petitioner repeatedly submitted documents to the United States District Court in an effort to obtain a hearing date for her motion to have the court reconsider the dismissal. The assigned judge, Robert T. Takasugi, was on assignment in the State of Hawaii. Petitioner worked with the court clerk and corrected various procedural errors alleged. Respondents responded to Petitioner's March 10, 1986 service of her motion.

On March 26, 1986, amid the confusion of the various filings by Petitioner and Respondents, an order was filed by Judge Robert Takasugi labeled, ORDER TAKING MOTION(S) UNDER SUBMISSION, which stated the following:

> On March 24, 1986, a motion to reconsider and vacate order of dismissal was filed by plaintiff, noticed for hearing 4/28/86.
> IT IS ORDERED that the opposition or statement of non-opposition to said motion be filed no later

than 4/3/86; and the reply, if any, be filed no later than 4/14/86; the hearing date is vacated. Sanctions will be imposed for any late filings.
By 4/24/86, the Court shall issue either (a) a ruling, or (b) an order requiring further briefing and/or setting the matter for oral argument.

Previous to the Court's order filed March 26, 1986, Petitioner had not heard from the Court regarding her motion for reconsideration. Petitioner submitted to the Court a notice of appeal regarding the February 28, 1986 dismissal order, which was not filed until March 28, 1986, after the filing of the Court's March 26, 1986 ORDER TAKING MOTION(S) UNDER SUBMISSION.

Despite the schedule ordered by Judge Robert Takasugi, in his March 26, 1986 ORDER TAKING MOTION(S) UNDER SUBMISSION, Respondents obtained from another judge an ex parte order extending the time in which they would file their Opposition to the motion of Petitioner. Respondents filed such Opposition on April 9, 1986 instead of the ordered date of April 3, 1986. Petitioner, from her location in the State of Colorado, did not receive copies of the Respondents' ex parte motion for an extension of time until approximately April 8, 1986 and otherwise did not have adequate time to reply to either the ex parte motion filed by Respondents or Respondents' opposition. Both Petitioner and Respondents argued to the court in the record that they did not have an adequate opportunity to present their arguments on the issue of whether there had been a showing of "good cause" under Rule 4(j) of the Federal Rules of Civil Procedure. Respondents, represented by a law firm of in excess of 100 attorneys, also continued to make various filings in support of their Opposition, on April 17, 1986 and on April 29, 1986. Petitioner, inexperienced in litigation and having to type, research, deliver and complete alone all tasks, attempted to make responses to filings by counsel for Respondents but before she could even receive RESPONDENTS'

SUPPLEMENTAL OPPOSITION OF DEFENDANTS TO THE PLAINTIFF'S MOTION TO RECONSIDER AND VACATE ORDER OF DISMISSAL, Judge Robert M. Takasugi, on April 29, 1986 issued an ORDER DENYING MOTION FOR RECONSIDERATION, which stated the following:

> This matter having come before the court on the motion by plaintiff to reconsider and vacate order of dismissal, and plaintiff having, on March 28, filed a notice of appeal from said order of dismissal thereby depriving this court of jurisdiction to entertain plaintiffs motion, IT IS ORDERED that the motion by plaintiff to reconsider and vacate order of dismissal is denied.

No other findings or other statements were made by Judge Takasugi. Petitioner then filed on May 15, 1986, a timely notice of appeal regarding the court's April 29, 1986 order.

C. The Court of Appeals' Decisions.

The two notices of appeal filed by Petitioner were consolidated into one appeal. Petitioner filed a Motion For Leave To Proceed In Forma Pauperis in response to which Respondents first requested an extension of time and then filed and Opposition to Appellant's Motion to Proceed In Forma Pauperis. Petitioner's motion to proceed in forma pauperis was denied on the basis argued by Respondents that it had not been filed in the appropriate court. It was not until October 30, 1986 that a docket fee was paid by Petitioner.

In the Court of Appeals for the Ninth Circuit Petitioner argued that the District Court was not deprived of jurisdiction to reconsider and vacate its February 28, 1986 order of dismissal of Petitioner's case by the filing of the notice of appeal on March 28, 1986, and that, therefore, the Court of

Appeals did not have jurisdiction regarding the dismissal resulting from the filing of the March 28, 1986 notice of appeal. Petitioner quoted Rule 5(b) of the Federal Rules of Civil Procedure in support of the validity of the March 10, 1986 service of Petitioner's motion upon Respondents.

Petitioner argued, alternatively, that if the District Court had been deprived of jurisdiction to hear her motion for reconsideration, the dismissal of her action was an abuse of discretion, given that she did not have notice of the dismissal or any other opportunity to fully develop and present her defenses to the dismissal. Petitioner argued that Rule 35 of the Federal Rules of Civil Court Procedure did not require a dismissal of her action, as indicated in the February 28, 1986 ORDER DISMISSING ACTION. Among other things, Petitioner argued that *Gibson v. United States,* 781 F.2d 1334, 1341 n.2 (9th Cir. 1986) established that whether a plaintiff had good cause for the delay in identifying and serving the individual wrongdoers is a factual issue, which must be decided in the first instance by the District Court; Petitioner argued that cases such as *Whale v. United States of America,* 792 F.2d 951 (9th Cir. 1986) establish that the court must provide the Petitioner with an adequate opportunity to present the requisite good cause, to prevent a dismissal under Rule 4(j) of the Federal Rules of Civil Procedure, which had not occurred in her case; and Petitioner argued that cases such as *Thompson v. Ralston Purina Company,* 599 F. Supp., 756, 759 (W.D. Mich 1984) evidenced that given the opportunity Petitioner could demonstrate good cause. In *Thompson* the court stated, "Because the Plaintiff in this case has now satisfied the prerequisites of filing a complaint with the EEOC and has provided notice thereby to the company, surprise should be no problem. And, because he is a pro se plaintiff, he should not suffer dismissal for late service", citing Rule 4(j) of the Federal Rules of Civil Procedure.

Respondents argued to the Court of Appeals that the District Court was deprived of jurisdiction to reconsider the

original dismissal. Respondents also argued that as a matter of law, the District Court's dismissal must be affirmed.

In a Memorandum decision, filed January 21, 1988, the Court of Appeals for the Ninth Circuit concluded:

> The district court erred in dismissing the Rule 59(e) motion on jurisdictional grounds . . . It being properly before the district court it should have been considered on the merits. It not having been so considered, we reverse and remand to permit the district court to determine whether its failure to provide the notice Rule 4(j) requires prejudiced Forrest. While the record before us does not indicate that Forrest has made a proper showing of prejudice, *it would be inappropriate for us to pass on that issue in view of the posture of these proceedings* (emphasis added).

Respondents made a variety of filings with the Court of Appeals in response to the January 21, 1988 Memorandum. The three-judge panel of the Court of Appeals for the Ninth Circuit granted the motion of Respondents for an extension of time to file a Petition For Rehearing And Suggestion For Rehearing En Banc notwithstanding Petitioner's argument that Respondents' motion for an extension of time indicated that Respondents were only rearguing their case, which is prohibited in a petition for rehearing.

In the Petition For Rehearing Suggestion For Rehearing En Banc, Respondents again argued the facts, attempting to persuade the three-judge panel that the March 10, 1986 service of Petitioner's motion for reconsideration had not been effective. Respondents argued that the service was not effective so that the Court of Appeals had jurisdiction to determine the validity of the February 28, 1986 dismissal pursuant to Petitioner's original notice of appeal.

In Appelant's Reply to Petition For Rehearing Suggestion For Rehearing En Banc of Appellees Petitioner again argued that Respondents had not satisfied the requirements and merely used the petition for rehearing as a procedural mechanism to reargue the facts and delay or avoid the reversal and remand. Petitioner also argued that there was an incomplete court record for determinations by the District Court or the Court of Appeals and emphasized that the three-judge panel of the Court of Appeals had ruled in Petitioner's favor regarding the original basis for the appeal, specifically that the district court was not deprived of jurisdiction to reconsider the dismissal of Petitioner's action. Consequently, the remand should occur to allow for the full reconsideration of the dismissal originally intended by District Judge Takasugi and reflected in his ORDER TAKING MOTION(S) UNDER SUBMISSION, filed March 26, 1986. Petitioner emphasized the many misrepresentations used by Respondents in their petition for rehearing, suggestion for rehearing en banc.

For example, Respondents had failed to comply with the ordered schedule of Judge Takasugi and filed their Opposition to Petitioner's hastily prepared motion for reconsideration, 6 days late. Respondents also continued on April 17, 1986 and on April 29, 1986, to file additional statements in response to Petitioner's hastily prepared motion for reconsideration, providing Petitioner, acting in pro per and having to by herself type and otherwise prepare the documents, with inadequate time to respond. Both Petitioner and Respondents had argued to the Court that they had inadequate time to prepare their presentations to the Court. Under these circumstances, Respondents now recharacterized the facts in their Petition For Rehearing Suggestion For Rehearing En Banc to state, "*after a full briefing* (emphasis added) Judge Takasugi dismissed the Rule 59(e) motion." The April 29, 1986 ruling by Judge Takasugi also makes it clear that he did not consider and dismiss the Rule 59(e) motion but instead concluded, based upon the arguments of Respondents, that he was deprived of jurisdiction to consider Petitioner's motion.

Not only were there acts of bad faith in these efforts of Respondents to recharacterize the facts to avoid the three-judge panel's reversal and remand in its January 21, 1986 Memorandum. The factual disputes between Petitioner and Respondents also did not satisfy the requirements for a petition for rehearing and suggestion for rehearing en banc.

Consistent with the three-judge panel's January 21, 1988 Memorandum, Petitioner again cited to the three-judge panel the decision of *Gibson v. United States*, 781 F.2d 1334, 1341 n.2 (9th Cir. 1986) in which the Ninth Circuit Court of Appeals decided, consistent with the January 21, 1986 Memorandum, that factual issues must be determined in the first instance by the District Court.

On May 25, 1988, the three-judge panel of the Ninth Circuit Court of Appeals ordered that they had voted to amend the Memorandum disposition, filed January 21, 1988, and with the disposition so amended, the panel had voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The District Court judge had not concluded that Petitioner's hastily prepared motion served on March 10, 1986, was untimely and suggested by its April 29, 1986 order that the motion was timely and otherwise appropriate for its consideration. However, in the Amended Memorandum, filed May 25, 1988, the three-judge panel ruled on the factual question relating to the Rule 59(e) motion, concluding that the motion was not made in a proper and timely fashion. The three-judge panel ruled that Petitioner's service of her March 10, 1986 motion was improper because service was not made upon Respondents' attorney. However, the panel failed to note that Respondents did not have attorneys of record at the time of such service.

The District Court judge had made no findings regarding the person upon whom the March 10, 1986 service was made

and no new facts had been presented since the three-judge panel's January 21, 1988 Memorandum. However, the three-judge panel proceeded without information regarding the employee of Respondent Occidental Petroleum Corporation upon whom the March 10, 1986 service had been made, or his responsibilities, and concluded that "service upon a security guard does not amount to leaving it at the party's office with the person in charge." The three-judge panel incorrectly stated the law regarding service, in Rule 5(b) of the Federal Rules of Civil Procedure, omitting language particularly relevant to any consideration of the validity of Petitioner's March 10, 1986 service of process. Rule 5(b) states:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

The three-judge panel omitted the language:

> or, if there is no one in charge, leaving it in a conspicuous place therein . . .

Petitioner had emphasized the words of Rule 5(b) in her Opening Brief which resulted in the three-judge panel's January 21, 1988 Memorandum reversing and remanding to

the District Court.

The three-judge panel also made other erroneous factual determinations including that there was no Memorandum of Points and Authorities or proof of service regarding the March 10, 1986 service. These determinations are refuted by the court record as reflected in Appendix D .

Based upon these various errors, the three-judge panel made the factual determination that, "proper service was never actually made upon the defendants. This being the case, the Rule 4(j) dismissal is properly before us."

Thereafter, the three-judge panel then referred to the same hastily prepared March 10, 1986 motion which it had just rejected as not being properly served. The three-judge panel concluded that by itself, the Petitioner's filing of the post-judgment motion provided an *opportunity* for the Petitioner to make a showing of good cause under Rule 4(j) of the Federal Rules of Civil Procedure and affirmed the District Court's original dismissal. The three-judge panel did not address the fact that the District Court's February 28, 1986 dismissal was stated to be under Rule 35 of the Federal Rules of Civil Procedure or that Petitioner had based her March 10, 1986 motion on various statutes including Federal Rules of Civil Procedure, 6(b), 60 or whatever other authority was found appropriate by the District Court in its discretion. The three-judge panel deprived the District Court of the opportunity to exercise any of its discretion.

Having concluded that by itself Petitioner's filing of the post-judgment motion provided the *opportunity* to make a showing of good cause, the three-judge panel then chose to ignore facts supporting a showing of good cause presented by Petitioner in the Opening Brief and Reply Brief, including regarding evasion of service of process by Respondents and abandonment by Petitioner's counsel. Respondents had confused the facts regarding Petitioner's evasion of service of

process argument by misrepresenting to the three-judge panel in footnote 21 of the Brief For Appellees that a letter to Irell & Manella regarding service of process only referred "to the plaintiff's earlier state wrongful termination complaint." As Petitioner subsequently proved to the three-judge panel in a document filed after the May 25, 1988 Amended Memorandum, Respondents were simultaneously arguing in state court appellate proceedings that the letter regarding service of process only "pertained to her federal race/sex discrimination claims."

Choosing to ignore certain facts presented by Petitioner in her Opening Brief and in her Reply Brief and without citing authority, the three-judge panel concluded with respect to selective facts:

> None of these theories appear to be factors beyond Forrest's control, and therefore do not establish good cause for failure to comply with Rule 4(j).

Therefore, the three-judge panel affirmed the District Court's original February 28, 1986 dismissal sua sponte and without notice to Petitioner,based upon the filing of a motion which the three-judge panel otherwise rejected as not having been properly filed or served and as lacking a Memorandum of Points and Authorities or proof of service. The District Court was prevented from exercising any of its discretion.

The three-judge panel's confusing May 25, 1988 Amended Memorandum relied upon additional factual errors including the three-judge panel's statement, which is inconsistent with the facts, to the effect that, "Prior to Forrest's filing the Rule 59(e) motion, Forrest appealed the Rule 4(j) dismissal."

In response to the confusion of the May 25, 1988 Amended Memorandum, Petitioner filed a Petition For Rehearing

Suggestion For Rehearing En Banc in which she emphasized that there had been numerous facts which had not been presented in the hastily prepared March 10, 1986 motion. Petitioner attempted to support this statement with an Emergency Motion filed pursuant to Local Rule 6(h). However, Respondents misrepresented to the three-judge panel that they had never received a copy of the documents referred to by the Petitioner in the local Rule 6(h) motion and the motion was denied by the three-judge panel. Petitioner subsequently presented to the three-judge panel evidence from the United States Postal Service of receipt of these documents by Respondents.

However, before receipt by the three-judge panel of the evidence to show the receipt of the local Rule 6(h) documents, the emergency motion of Petitioner was denied and the three-judge panel denied Petitioner's petition for rehearing and rejected the suggestion for rehearing en banc, as evidenced in an order filed July 20, 1988.

Petitioner submitted additional information to the Court of Appeals for the Ninth Circuit highlighting misrepresentations by Respondents and providing supplemental United States Supreme Court authority to support the reversal and remand of the January 21, 1988 Memorandum. However, the document submitted by Petitioner, which was labeled Petition For Review, was rejected, although filed within 14 days of the ruling on July 20, 1988. Apparently, a Petition For Review was an incorrect labeling for the document in which the information was submitted. Respondents have never denied Petitioner's descriptions of their misrepresentations to the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

This petition presents the narrow but recurring and vitally important question of the scope of the jurisdiction of the Federal Court of Appeals. The decision of the three-judge panel of the Ninth Circuit Court of Appeals is inconsistent with *Gibson v. United States,* 781 F.2d 1334 (9th Cir. 1986); *Ruiz Varela v. Sanchez Velez,* 814 F. 2d 821 (1st Cir. 1987); *Whale v. United States,* 792 F.2d 951 (9th Cir. 1986); *Icicle Seafood, Inc. v. Worthington et al,* 475 US 709 (1986) and other authorities in allowing the Court of Appeals to become the fact finder. Under relevant statutory and case law there should be a reversal and remand to allow the District Court to make necessary fact findings, including the critical question of providing an adequate opportunity to demonstrate good cause to avoid a dismissal. In several aspects of the appellate court proceedings, the three-judge panel of the Ninth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Moreover, the three-judge panel of the Ninth Circuit Court of Appeals assumes the discretion of the District Court and decides what is good cause for the purposes of Rule 4(j) of the Federal Rules of Civil Court Procedure by ignoring facts found to constitute good cause in other cases and by otherwise inconsistently deciding an important question of federal law which has not been settled by this Court but should better be settled by this Court and should only be settled based upon an adequate opportunity to present the facts as envisioned by the requirements of Rule 4(j).

1. THE COURT OF APPEALS WAS CORRECT IN ITS ORIGINAL DETERMINATION TO REVERSE AND REMAND, AS REFLECTED IN THE MEMORANDUM DECISION, FILED JANUARY 21, 1988.

A. THE COURT OF APPEALS WAS IN ERROR AND INCONSISTENT WITH UNITED STATES

SUPREME COURT AND APPELLATE COURT AUTHORITY IN ITS AMENDED DETERMINATION THAT THE DISTRICT COURT DID NOT HAVE JURISDICTION TO HEAR PETITIONER'S MOTION FOR RECONSIDERATION BASED UPON THE ERRONEOUS FACT FINDING AND APPLICATION OF INCOMPLETE LAW BY THE COURT OF APPEALS.

In its Memorandum decision, filed January 21, 1988, the three-judge panel of the Ninth Circuit Court of Appeals concluded:

> The district court erred in dismissing the Rule 59(e) motion on jurisdictional grounds . . . It being properly before the district court it should have been considered on the merits. It not having been so considered, we reverse and remand to permit the district court to determine whether its failure to provide the notice Rule 4(j) provides prejudiced Forrest. While the record before us does not indicate that Forrest has made a proper showing of prejudice, *it would be inappropriate for us to pass on that issue in view of the posture of these proceedings.* (emphasis added.)

In support of its conclusion that the Petitioner's March 28, 1986 notice of appeal was null and void because of the pendency of the Rule 59(e) motion, the three judge panel cited *Griggs v. Provident Consumer Discount Co,* 459 U.S. 56, 61 (1982).

In *Griggs,* supra at 61, the Court stated that a subsequent notice of appeal is also ineffective if it is filed while a timely Rule 59(e) motion is still pending. The Court recognized that where a notice of appeal is ineffective it shall have no effect and it is as if no notice of appeal were filed at all. According to the Supreme Court, if no notice of appeal is filed at all, the Court

of Appeals lacks jurisdiction to act.

In its Amended Memorandum decision, the three-judge panel attempted to circumvent *Griggs,* and its earlier reversal and remand by improperly drawing various factual conclusions that were not supported by the record. On the basis of these unsupported conclusions, the panel determined that the Rule 59(e) motion was not timely and therefore the panel still retained jurisdiction to proceed to the ultimate question of the validity of the dismissal.

In *Icicle Seafoods, Inc. v. Worthington et al.,* 475 U.S. 709 (1986) the Court, per Justice Rehnquist,considered an appeal from a decision by the Court of Appeals for the Ninth Circuit. The Court of Appeals had reversed the district court without mentioning "any of the factual findings of the District Court, much less discuss or analyze them . . . The Court of Appeals reviewed the record independently." 475 U.S. at 713.

In vacating the judgment of the Court of Appeals and remanding the case, the United States Supreme Court stated:

> We think that the Court of Appeals was mistaken to engage in such factfinding . . . The question . . . is a question of fact . . . If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings . . . But it should not simply have made the factual findings on its own. 475 U.S. at 714.

In *Pullman-Standard v. Swint et al.,* 456 U.S. 273 (1982) this Court also reversed the Court of Appeals and remanded for further proceedings. Particularly pertinent to the instant case, in that case the Court concluded that:

> When an appellate court discerns that a district

> *court has failed to make a finding because of an erroneous view of the law* (emphasis added), the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings.

In the treatise, *Federal Procedure,* Lawyers' Edition, the commentators state, citing case authority:

> An appropriate review by the Court of Appeals is not possible where by reason of the District Court's failure to make findings the reviewing court is left in doubt as to just what the trial court believed the facts to be and is left to speculate as to the basis for judgment. Under such circumstances, regardless of the parties' mutual disregard of the court's error in failing to make findings of fact, the Court of Appeals must remand the case and direct the lower court to make findings. This includes the situation where the District Court fails to make a finding because of an erroneous view of the law. 33 *Fed. Proc. L. Ed.* 215-216.

The foregoing authorities support a very clear conclusion that when the Court of Appeals conclusively determined that the district court had not been deprived of jurisdiction to reconsider the dismissal of appellant's action, the Court of Appeals, consistent with it's January 21, 1988 Memorandum decision, should have reversed and remanded to the district court. Also see *Gibson v. United States,* 781F.2d 1334, 1341 n.2 (9th Cir. 1986).

The April 29, 1986 order of the District Court recognized the validity of the March 10, 1986 service by Petitioner. The three-judge panel did not establish that the District Court was clearly erroneous. Moreover, in attempting, in error, to act as the fact finding body. the three-judge panel was also in error in

concluding that the Petitioner had not filed points and authorities or proof of service. The Docket Sheet in the United States District Court clearly illustrates this error. The three-judge panel failed to acknowledge all of the methods of acceptable service of process under Rule 5(b) of the Federal Rules of Civil Procedure. The three-judge panel's redetermination that the Rule 59(e) motion was not timely is without support.

B. THE COURT OF APPEALS WAS IN ERROR AND INCONSISTENT WITH APPELLATE COURT AUTHORITY IN ITS AMENDED DETERMINATION THAT THE DISMISSAL MUST BE AFFIRMED.

From their first Brief For Appellees, Respondents argued that the Court of Appeals could avoid the jurisdiction question and conclude as a matter of law that Petitioner's case should be dismissed under Rule 4(j) of the Federal Rules of Civil Procedure. The three-judge panel rejected this argument in its January 21, 1988 Memorandum decision.

In their purported Petition For Rehearing Suggestion For Rehearing En Banc Respondents again argued this point.

Rule 4(j) of the Federal Rules of Civil Procedure requires that a party be permitted to demonstrate good cause as to why service was not made within the required period. The Practice Commentaries on Rule 4(j) which provide the most in depth analysis of the relatively new statute state that the 120 day period of Rule 4(j) is not absolute. The commentaries recognize that, "What 'good cause' is is neither defined nor even guided" in Rule 4(j). The District Court Judge makes the determination in his discretion after reviewing and weighing the evidence and his ruling is subject to appellate review for an

abuse of discretion. Evasion of service is the most clearly recognized basis of good cause. However, "The issue is fluid, factual variation infinite, judicial discretion vast." D. Siegel, Practice Commentary on Amendment of Federal Rule 4 (eff. Feb. 26, 1983) 96 F.R.D. 88 (1983).

It is envisioned that a plaintiff will have *adequate opportunity* to demonstrate the requisite good cause. See e.g., *Whale v. United States,* 792 F.2d 951 (9th Cir. 1986). None of the cases in which the court has applied this standard to affirm a dismissal, has involved facts similar to those of the instant case. In this case, the standard of *Whale* was violated. The District Court was never provided with an opportunity to review the facts as envisioned by Rule 4(j) and Petitioner was not allowed the opportunity to make the good cause showing as required by *Whale* and as proposed by the District Court in its March 26, 1986 order. The opportunity to make the good cause showing was not only sabotaged by the Respondents pressing of the spurious claim that the district court had been deprived of jurisdiction to reconsider, an issue upon which Petitioner was then forced to focus. Respondents also violated the District Court's March 26, 1986 time schedule and order by obtaining from another judge an extension of time which prevented Petitioner from having adequate time to make her arguments. Thereafter, Respondents made misrepresentations to the three-judge panel including to avoid the panel's consideration of the sampling of facts evidenced in the Petitioner's Emergency motion under local Rule 6(h).

Good cause under Rule 4(j) has been found where the plaintiff delayed in service of process for 120 months, *Del Raine v. Carlson,* 826 F.2d 698 (7th Cir. 1987); where the EEOC had provided notice of the lawsuit and the plaintiff was acting in pro per, *Thompson v. Ralston Purina Co.,* 599 F. Supp. 756, 759 (W.D. Mich. 1984); and where plaintiff has been abandoned by counsel, *Anderson v. Air West, Inc.* 542 F.2d 512 (9th Cir. 1976).These factors, as well as elements of evasion of service of process exist in the instant case. The three-

judge panel could not conclude, even in response to Petitioner's hastily prepared March 10, 1986 motion, that as a matter of law the District Court judge, in the exercise of his discretion, could only conclude that Petitioner has not satisfied the requirements of Rule 4(j), Rule 6(b), Rule 60 or other applicable authority referred to in Petitioner's March 10, 1986 motion.

In *Ruiz Varela v. Velez,* 814 F.2d 821, 824 (1st Cir. 1987), the Court of Appeals for the First Circuit noted that although the plaintiff had not been provided with notice of the district court's sua sponte dismissal under Rule 4(j), plaintiff had the opportunity to file and did file a motion for reconsideration arguing that he had good cause for this failure of service. Nevertheless, citing *Gibson v. United States,* 781 F.2d 1334, 1341 n.2 (9th Cir. 1986), which has often been cited by Petitioner, the Court of Appeals for the First Circuit vacated the dismissal and remanded to the District Court for further consideration because the District Court did not hold a hearing after plaintiff raised his allegations in the motion for reconsideration. The Court of Appeals stated that it was incumbent upon the district court to hold a hearing so that there could be a factual inquiry into plaintiff's allegations or at least to state adequate reasons why such factual inquiry was unnecessary and dismissal nevertheless appropriate.

The decision in this case is inconsistent with *Ruiz Varela v. Valez*, supra. Petitioner can introduce evidence of factors which should be subject to the factual inquiry of the district court given the "fluid, factual variation infinite" nature of the showing of good cause. Among other things, it would be a violation of and inconsistent with the equal protections of the laws of the United States as provided in Article 14, Section 1 of the Constitution of the United States to fail to provide Petitioner with the adequate opportunity to make such a showing.

CONCLUSION

Rule 4(j) envisions that a plaintiff is provided an adequate opportunity to show good cause for the failure to serve process on defendants within 120 days of filing a complaint. The term good cause is subject to infinite factual variation and is defined in a particular case according to the discretion of the district court judge. Respondents' procedural arguments prevented the exercise of such discretion in the instant case and prevented providing Petitioner the opportunity to make the required showing. The foregoing authorities clearly establish that the Court of Appeals should not have become a fact finder on limited facts but was correct in its original determination that there should be a reversal and remand to accomadate a hearing to determine Petitioners "good cause" or other basis for relief from the February 28, 1986 dismissal, without notice.

APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
JAN 21 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ERNESTINE FORREST,

Plaintiff-Appellant,

v.

OCCIDENTAL PETROLEUM CORP., DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORP., WHITE CORP., RED CORP., ARMAND HAMMER,

Defendants-Appellees.

Nos. 86-5818, 86-5920

DC# CV-84-8897-RMT

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding
Submitted November 30, 1987**

Before: KILKENNY, SNEED, and O'SCANNLAIN, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

Forrest appeals, first, the dismissal of her employment discrimination action pursuant to Rule 4(j), F. R. Civ. P., and, second, the dismissal of her Rule 59(e), F. R. Civ. P., motion. We conclude the first appeal is null and void, and we affirm the Rule 59(e) dismissal on grounds other than those on which the district court relied.

Forrest filed an employment discrimination action against the Occidental Petroleum Corporation and others. No defendants were served for sixteen months; the district court, sua sponte, dismissed the action pursuant to Rule 4(j). It failed, however, to give Forrest the notice that Rule 4(j) requires. More than ten days later Forrest filed a motion to reconsider the dismissal presumably pursuant to Rule 59(e). Occidental was not served but did learn of the motion and in due course responded. Prior to this response, but subsequent to Forrest's rule 59(e) motion, Forrest appealed the Rule 4(j) dismissal. The district court, after considering Forrest's showing of "good cause" for failing to serve the defendants and the response of Occidental thereto, dismissed Forrest's Rule 59(e) motion for lack of jurisdiction because of Forrest's earlier appeal of the Rule 4(j) dismissal. Forrest then appealed the Rule 59(e) dismissal. Both appeals are now before us.

Forrest's showing of good cause consisted of the following: (1) failure to obtain counsel; (2) financial difficulties due to a failure to obtain employment and an automobile accident; (3) absence from Los Angeles while seeking a job; (4) no knowledge of service of process; and, (5) lack of prejudice to defendants. Forrest is an attorney admitted to practice before the United States District Court for the Central District of California.

The district court erred in dismissing the Rule 59(e) motion on jurisdictional grounds. The Rule 4(j) appeal was null and void because of the pendency of the Rule 59(e) motion. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982). The Rule 59(e) motion was timely filed, albeit not

within the ten days of the dismissal pursuant to Rule 4(j), because the district court failed to enter a judgment of dismissal pursuant to Rule 58, F. R. Civ. P. A Rule 59(e) motion may be made prior to the entry of judgment. *See Smith v. Hudson*, 600 F.2d 60, 62 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979). It being properly before the district court it should have been considered on the merits. It not having been so considered, we reverse and remand to permit the district court to determine whether its failure to provide the notice Rule 4(j) requires prejudiced Forrest. While the record before us does not indicate that Forrest has made a proper showing of prejudice, it would be inappropriate for us to pass on that issue in view of the posture of these proceedings.

REVERSED AND REMANDED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
FEB 5 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ERNESTINE FORREST,

Plaintiff-Appellant,

v.

OCCIDENTAL PETROLEUM CORP., DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORP., WHITE CORP., RED CORP., ARMAND HAMMER,

Defendants-Appellees.

Nos. 86-5818, 86-5920

DC# CV-84-8897-RMT

ORDER

Before: KILKENNY, SNEED, and O'SCANNLAIN, Circuit Judges.

Appellees' motion for a one-week extension of time within which to file a petition for rehearing and suggestion for hearing in banc is granted. Appellees shall have to and including February 11, 1988, within which to file their petition.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
MAY 25 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ERNESTINE FORREST,

Plaintiff-Appellant,

v.

OCCIDENTAL PETROLEUM CORP., DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORP., WHITE CORP., RED CORP., ARMAND HAMMER,

Defendants-Appellees.

Nos. 86-5818, 86-5920

DC# CV-84-8897-RMT

ORDER

Before: KILKENNY, SNEED, and O'SCANNLAIN, Circuit Judges.

The panel in this case has voted to amend its memorandum disposition filed January 21, 1988 as attached.

With the disposition so amended, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
MAY 25 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ERNESTINE FORREST,

Plaintiff-Appellant,

v.

OCCIDENTAL PETROLEUM CORP., DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORP., WHITE CORP., RED CORP., ARMAND HAMMER,

Defendants-Appellees.

Nos. 86-5818, 86-5920

DC# CV-84-8897-RMT

AMENDED MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding
Submitted November 30, 1987**
Filed January 21, 1988

Before: KILKENNY, SNEED, and O'SCANNLAIN, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

Forrest appeals, first, the dismissal of her employment discrimination action pursuant to Federal Rule of Civil Procedure 4(j), and second, the denial of her motion to reconsider the dismissal under Federal Rule of Civil Procedure 59(e).

We affirm dismissal of the action under Rule 4(j) and affirm the denial of the Rule 59(e) motion on the ground that it was not made in a proper and timely fashion.

I.

FACTS

Forrest filed an employment discrimination action against Occidental Petroleum Corporation and others. No defendants were served for sixteen months. The district court, *sua sponte,* dismissed the action pursuant to Rule 4(j). It failed, however, to give Forrest the notice that Rule 4 (j) requires. Ten days later, within the time required by Rule 59(e), Forrest attempted to served Occidental with a notice of her motion to reconsider the dismissal. Occidental claims that it was never properly served with the motion.

Prior to Forrest's filing the Rule 59(e) motion, Forrest appealed the Rule 4(j) dismissal. The district court, notwithstanding its consideration of Forrest's showing of "good cause" for failing to serve the defendants and the response of Occidental thereto, concluded that it lacked jurisdiction to consider the Rule 59(e) motion because of Forrest's earlier appeal of the Rule 4(j) dismissal. Forrest then appealed the denial of the Rule 59(e) motion. Both appeals are now before us.

II.

THE RULE 59(e) MOTION

The district court held that because the plaintiff had filed a notice of appeal from the Rule 4(j) dismissal, it was deprived of jurisdiction to hear the Rule 59(e) motion. Excerpt of Record (E.R.) at 21. This is incorrect.

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 . . . [a] notice of appeal filed before the disposition of [such motion] shall have no effect.

Fed. R. App. P. 4(a) (4). It is the notice of appeal that is ineffective when it is filed while a timely Rule 59 motion is pending. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982). There it was held that where a timely Rule 59 motion was filed, an appeal filed seven days later was "not just defective; it was a nullity." *Id.*

In this case, however, Occidental contends that no timely Rule 59 motion was made because it was never properly served with the Rule 59 motion. If this be true, the Rule 4(j) appeal is properly before us. We so hold.

A Rule 59(e) motion *must* be served within 10 days of the final judgment. Fed. R. Civ. P. 59(e); *see* 6A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* § 59.12[1] (2d ed. 1987). The final judgment dismissing the action in this case was entered on February 28, 1984. On March 10, 1984 the plaintiff attempted to serve the defendant by delivering a copy of the Rule 59 motion to a security guard at Occidental.

The Federal Rules of Civil Procedure provide:

> Whenever under these rules service is required or

> permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party . . . Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof . . .

Fed. R. Civ. P. 5(b). The service in this case was improper for two reasons. First, the plaintiff failed to serve the defendant's attorney. Service upon a party who is represented by an attorney is improper. 2 J. Moore, J. Lucas, H. Fink & C. Thompson, *Moore's Federal Practice* § 5.06 (2d ed. 1987). Secondly, even if service upon the party had been authorized, service upon a security guard does not amount to leaving it at the party's office with the "person in charge." *See* Fed. R. Civ. P. 5(b). Thus, although March 10 was within the 10-day statutory period required for a Rule 59 motion, proper service was never actually made upon the defendants.[1] This being the case, the Rule 4(j) dismissal is properly before us.

[1]Not only was the method of service defective, the motion itself was flawed. The plaintiff failed to include a Memorandum of Points and Authorities with the motion, and the motion was not accompanied by a proof of service.

III.

RULE 4(j) DISMISSAL

We review an order dismissing an action under Rule 4(j) for failure to serve under an abuse of discretion standard. *Wei v. Hawaii*, 763 F. 2d 370, 371 (9th Cir. 1985) (per curiam).

Forrest argues that the district court's failure to give her notice before dismissing her case denied her the opportunity to show good cause for failure to serve the defendant. Appellant's Brief at 10-11. Although the district court ordinarily must give

notice before dismissing her case denied her the opportunity to show good cause for failure to serve the defendant. Appellant's Brief at 10-11. Although the district court ordinarily must give notice to the plaintiff before a dismissal under Fed. R. Civ. P. 4(j), such notice may be excused if the plaintiff had an adequate opportunity to show good cause for failure to timely serve the defendants. *See Whale v. United States*, 792 F. 2d 951, 952 (9th Cir. 1986). A post-judgment motion provides a defendant with such an opportunity. *Id.* (Rule 60(b) motion); *Wei*, 763 F.2d at 371 (post-judgment application to reinstate the action). Forrest made a post-judgment motion to reconsider the dismissal. E.R. at 22. The district court, however, held that Forrest's subsequent notice of appeal deprived it of jurisdiction to consider the motion. E.R. at 21. Forrest argues that this conclusively demonstrates that she was denied the opportunity to show good cause. Appellant's Brief at 11.[2]/

We disagree. In her post-judgment motion she advanced several possible theories of good cause: (1) failure to obtain counsel, E.R. at 35-36, 37-38; (2) financial difficulty resulting from failure to obtain employment and from a car accident, E.R. at 36, 37; (3) her absence from Los Angeles while on an extensive job hunt; (4) no knowledge of service of process deadline, E.R. at 39; and (5) the lack of prejudice to the defendants. None of these theories appear to be factors beyond Forrest's control, and therefore do not establish good cause for failure to comply with Rule 4(j). *See Townsel v. County of Contra Costa*, 820 F.2d 319, 320 (9th Cir. 1987) (lack of knowledge of the rule not good cause); *Wei*, 763 F.2d at 371-72 (inadvertent failure to serve complaint not good cause). Forrest had an adequate opportunity to show good cause but failed to do so. She was not prejudiced by the lack of notice. Therefore, the district court did not abuse its discretion in dismissing the action pursuant to Rule 4(j).

AFFIRMED.

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[2]/ Had Forrest appealed the dismissal without first making a motion to reconsider, this court would have been required to reverse the dismissal because she would have had no opportunity to show good cause. Because she made a motion to reconsider and filed several documents with the lower court explaining her theories of good cause for failure to serve the defendants, the court did have an opportunity to review her arguments.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
JUN 29 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ERNESTINE FORREST, Plaintiff-Appellant, v. OCCIDENTAL PETROLEUM CORP., DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORP., WHITE CORP., RED CORP., ARMAND HAMMER, Defendants-Appellees.	)	Nos. 86-5818, 86-5920 DC# CV-84-8897-RMT **ORDER**

Before: KILKENNY, SNEED, and O'SCANNLAIN, Circuit Judges.

Appellant's emergency motion is denied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
JUL 20 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ERNESTINE FORREST,	)	
	)	
Plaintiff-Appellant,	)	
	)	Nos. 86-5818, 86-5920
v.	)	
	)	DC# CV-84-8897-RMT
	)	
OCCIDENTAL PETROLEUM CORP., DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORP., WHITE CORP., RED CORP., ARMAND HAMMER,	)	**ORDER**
	)	
Defendants-Appellees.	)	
	)	
	)	

Before: KILKENNY, SNEED, and O'SCANNLAIN, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

P.O. Box 547

San Francisco, California 94104

DATE: Aug. 10, 1988

MEMORANDUM

TO: Counsel

FROM: Cathy A. Catterson, Clerk

BY: Rhonda Caldwell

SUBJECT: Defective Petition for Rehearing

CA No. 86-5818 and 86-5920

A petition for rehearing in the referenced case was received on Aug. 8, 1988 and could not be filed for the following reason(s):

[ ] **The petition was received late.** A motion for leave to file it late must be submitted.

[ ] **The petition was received late and the mandate has issued.** A motion to recall the mandate must be submitted.

[ ] **An insufficient number of copies of the petition were received.** Please submit an additional _____ copies immediately and the petition will be filed.

On 6/13/88 Ernestine Forrest filed a petition for rehearing with suggestion for rehearing en banc. On 7/20/88 the court denied the petition for rehearing with suggestion for rehearing en banc. You are only allowed to file one petition for rehearing or petition for rehearing with suggestion for rehearing en banc. This petition is being returned back to you.

CA9-018 (11/5/79)

16a

APPENDIX "B"

Central 3-0703

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
3255 Wilshire Boulevard, 9th Floor
Los Angeles, California 90010

OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE $300

Rec'd 8/24/84

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO: Ernestine Forrest
P.O. Box 19221 A
Los Angeles, CA 90019

☐ On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a)).

FROM: Equal Employment Opportunity Commission
3325 Wilshire Blvd. 9th Floor
Los Angeles, CA 90010

CHARGE NUMBER
092830703

EEOC REPRESENTATIVE
Legal Officer Of the Day

TELEPHONE NUMBER
(213) 688-3780

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 and the other information on the reverse side of this form.)

TO THE PERSON AGGRIEVED:

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☒ More than 180 days have expired since the filling of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filling of the charge.

☒ With the issuance of this Notice of Right to Sue, the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

☐ ADEA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under the law, you obtained the right to sue under the Age Discrimination in Employment Act (ADEA) when you filed your charge, subject to a 60-day waiting period. ADEA suits must be brought within 2 year (3 years in cases of willful violations) of the alleged discrimination.

☐ EPA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you already have the right to sue under the Equal Pay Act (EPA) (you are not required to complain to any administrative agency before bringing an EPA suite in court). EPA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged EPA underpayment.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

cc: (to respondent)

On Behalf of the Commission

/s/ Jesus Estrada-Melendez
TYPE NAME AND TITLE OF ISSUING OFFICIAL

Jesus Estrada-Melendez District Director

5/17/84
DATE

☐ Copy of Charge

Occidental Petroleum Corporation
10889 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90024

FILED
FEB 28 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
BY JS DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERNESTINE FORREST,

Plaintiff(s),

vs.

OCCIDENTAL PETROLEUM,

Defendant(s).

No. CV 84-8897-RMT

ORDER DISMISSING ACTION

This action having been commenced on November 20, 1984, and no service having been accomplished pursuant to Rule 35, FRCivP, IT IS ORDERED that this action is hereby dismissed.

Dated: February 28, 1986.

/s/ Robert M. Takasugi
Robert M. Takasugi
United States District Judge

✓ Docketed
✓ Mld copy Ptys
✓ Mld

3 MAR 1986

FILED
MAR 26 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERNESTINE FORREST,

Plaintiff(s),

vs.

OCCIDENTAL PETROLEUM CORP; et al

Defendant(s).

No. CV 84-8897-RMT

ORDER TAKING MOTION(S) UNDER SUBMISSION

On MsMarch 24, 1986, a motion to reconsider and vacate order of dismissal was filed by plaintiff, noticed for hearing 4/28/86.

IT IS ORDERED that the opposition or statement of non-opposition to said motion be filed no later than 4/3/86; and the reply, if any, be filed no later than 4/14/86; the hearing date is vacated. Sanctions will be imposed for any late filings.

By 4/24/86, the Court shall issue either (a) a ruling, or (b) an order requiring further briefing and/or setting the matter for oral argument.

Dated: 3/26/86

/s/ Robert M. Takasugi

Robert M. Takasugi
United States District Judge

FILED
APR 29 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
BY JS DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERNESTINE FORREST,	)	
	)	
Plaintiff,	)	
	)	No. CV 84-8897-RMT
vs.	)	(PAS)
	)	
	)	
OCCIDENTAL PETROLEUM CORPORATION; DUDLEY E. MILLER; GERALD M. STERN; RONALD P.KLEIN; ROBERT E. SAWYER; BLACK CORPORATION: WHITE CORPORATION; RED CORPORATION; ARMAND HAMMER; DOES 1 through 30;	)	**ORDER DENYING MOTION FOR RECONSIDERATION**
Defendants .	)	
	)	
	)	

This matter having come before the court on the motion by plaintiff to reconsider and vacate order of dismissal, and plaintiff having, on March 28, 1986, filed a notice of appeal from said order of dismissal thereby depriving this court of jurisdiction to entertain plaintiff's motion,

IT IS ORDERED that the motion by plaintiff to reconsider and vacate order of dismissal is denied.

Denied: April 29, 1986.

/s/ Robert M. Takasugi

Robert M. Takasugi
United States District Judge

FILED
SEP 18 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNESTINE FORREST,

Plaintiff-Appellant,

vs.

OCCIDENTAL PETROLEUM CORP., et al

Defendants-Appellees.

Nos. 86-5818 & 86-5920
DC# CV-84-8897-RMT
Central California

ORDER

Before: WRIGHT and SCHROEDER, Circuit Judges

Appellant's motion for leave to appeal in forma pauperis is denied, without prejudice to renewal before the district court under Fed. R. App. P. 24(a). Appellant may also request from the district court an indication whether it would entertain a motion for relief from judgment if revested with jurisdiction under the procedures described in Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir. 1986).

MoCal 9/8/86

FILED
AUG 23 1988
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
BY DEPUTY

APPENDIX "C"

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNESTINE FORREST,

Plaintiff-Appellant,

v.

OCCIDENTAL PETROLEUM CORP., DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORP., WHITE CORP., RED CORP., ARMAND HAMMER,

Defendants-Appellees.

No. 86-5818, 86-5920
DC# CV-84-8897-RMT

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

LODGED
AUG 18 1988
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
BY DEPUTY

Filed and entered May 25, 1988

FILED
JUL 20 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNESTINE FORREST, Plaintiff-Appellant, v. OCCIDENTAL PETROLEUM CORP., DUDLEY E. MILLER, GERALD M. STERN, RONALD P. KLEIN, ROBERT E. SAWYER, BLACK CORP., WHITE CORP., RED CORP., ARMAND HAMMER, Defendants-Appellees.	)	Nos. 86-5818, 86-5920 DC# CV-84-8897-RMT **ORDER**

Before: KILKENNY, SNEED, and O'SCANNLAIN, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX "D"

ERNESTINE FORREST

Name (Note: if represented by an attorney, his name, address & telephone number).

1422 South Nadeau Drive
L.A., Ca. 90019
Temp. P.O. Box 46013
Denver, Colorado 80201
(303) 231-6368

Address

FILED
MAR 28 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
BY s ELH DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERNESTINE FORREST, Plaintiff(s) vs. OCCIDENTAL PETROLEUM CORP.; DUDLEY E. MILLER; GERALD M. STERN; RONALD P. KLEIN; ROBERT E. SAWYER; ARMAND HAMMER; DOES 1 through 30; BLACK CORP.; WHITE CORP.; RED CORP. Defendant(s)	CASE NUMBER CV-84 8897-RMT(PAS) **NOTICE OF APPEAL**

Notice is hereby given that ERNESTINE FORREST (Name of Appellant) hereby appeals to the United States

Court of Appeals for the Ninth Circuit from ORDER (judgment or order) entered in this action on FEBRUARY 28, 1986 (date judgment or order entered on the docket sheet).

DATED: March 26, 1986

/s/ Ernestine Forrest

Signature of appellant or appellant's attorney

Attorney for Defendants
Jose R. Benavides, Esq.
Irell & Manella
1800 Avenue of the Stars, Suite 900 L.A., Ca. 90067-4276

NOTE: Pursuant to Local Rule 17 service of the notice of appeal may be made by the appellant or appellant's attorney or the clerk of the district court. If the clerk is to make service, the notice shall contain the names and addresses of the attorneys' for all the parties to the action or, if not represented by an attorney, the names and addresses of the parties. Each party filing a notice of appeal with this court shall furnish a sufficient number of copies of such notice to enable the clerk to comply with the mailing required by Rule 73 of the Federal Rules of Civil Procedure.

CV 66 (09/83) NOTICE OF APPEAL

ERNESTINE FORREST

Name (Note: if represented by an attorney, his name, address & telephone number).

1422 South Nadeau Drive
L.A., Ca. 90019
Temp. P.O. Box 46013
Denver, Colorado 80201
(303) 231-6368

Address

FILED
MAY 15 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
BY s MB DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERNESTINE FORREST,

Plaintiff(s)

vs.

OCCIDENTAL PETROLEUM CORP.; DUDLEY E. MILLER; GERALD M. STERN; RONALD P. KLEIN; ROBERT E. SAWYER; ARMAND HAMMER; DOES 1 through 30; BLACK CORP.; WHITE CORP.; RED CORP.

Defendant(s)

CASE NUMBER

CV84 8897RMT-02

NOTICE OF APPEAL

MAY 20, 1986

~~86-5818~~

86-5920

Notice is hereby given that ERNESTINE FORREST (Name of Appellant) hereby appeals to the United States

Court of Appeals for the Ninth Circuit from ORDER (judgment or order) entered in this action on APRIL 29, 1986 (date judgment or order entered on the docket sheet).

DATED: May 11, 1986

/s/ Ernestine Forrest

Signature of appellant or appellant's attorney

Attorney for Defendants
Jose R. Benavides, Esq.
Irell & Manella
1800 Avenue of the Stars, Suite 900 L.A., Ca. 90067

NOTE: Pursuant to Local Rule 17 service of the notice of appeal may be made by the appellant or appellant's attorney or the clerk of the district court. If the clerk is to make service, the notice shall contain the names and addresses of the attorneys' for all the parties to the action or, if not represented by an attorney, the names and addresses of the parties. Each party filing a notice of appeal with this court shall furnish a sufficient number of copies of such notice to enable the clerk to comply with the mailing required by Rule 73 of the Federal Rules of Civil Procedure.

CV 66 (09/83) NOTICE OF APPEAL

APPENDIX "D"

DATE	NR.	CV 84-8897RMT(~~JR~~)(Px) PROCEEDINGS
11-20-84	nm°	1. Fld Complt. Iss Summs.
		2. Fld notc & Ord of ref to U.S. Magistrate
11-21-84	nm°	3. Fld Ord vacating ref to U.S. Mag. Case may be ref to Mag Penne for discvry in all fur proceedings. CC partys.
2-28-86	pb	4. ORD Dismissing actn. (ENT 2-28-86) mld cpys MD JS 6
3-19-86	pb	5. Declar of Jose R. Benavides, Esq in resp to pltf's purported, yet unifld mtn to reconsider the vacate order of disml. deft
3-24-86	pb	6. Notc of mtn & mtn to reconsider & vacte ord of disml, 4-28-86 at 9:30 a.m. pltf LODGED Ord
3-24-86	pb	7. Memo in support of mtn to reconsider & vacate ord of disml pltf
3-24-86	pb	8. P&A's in support of mtn to recons & vacate ord of disml. pltf
3-26-86	pb	9. ORD tkng mtns under subm; opp or stmt of non-opp filed NLT 4-3-86; reply 4-14-86; the hrg date is vacated. Sactions will be imposef for late filing
3-28-86	mb	10. Fld pltf's NOTC OF APPEAL to the 9th CCA frm ORD ent 2-28-86. Billed for docket fee.
4-2-86	pb	11. Ex parte appl of defts for ord grntng it an ext of ti to resp to Crt's 3-26-86 Ord tkng the pltf's mtn to reconsider & vacate undr subm; P&A's in support. deft LODGED Ord
4-2-86	pb	12. Declar of Jose R. Benavides, Esq. in support of deft's ex parte appl for Ord grntg ext it etc. deft
4-9-86	pb	13. Opp of deft to the pltf's mtn to reconsider & vacate ord of disml. deft

4-15-86	pb	14.	Memo of P&A's in support of pltf' declar in rpely to defts declar & appl etc. pltf
4-15-86	pb	15.	Declar in reply to defts' declar & appl & memo of P&A's etc. pltf
4-17-86	pb	16.	Declar of James F. Elliott, Esq. in support of opp to pltf's mtn to reconsider & vacate ord of disml w/ o prej. deft
*4-10-86	pb	17.	Ex parte ORD that deft Occidental Petroleum Corp has ext of ti to file resp 4-9-86, pltf mtn of 3-24-86 to reconsider & vacate its 2-28-86 Ord dism actn.
4-28-86	pb	18.	Declar of pltf in reply to defts' add stmt in opp to pltf's mtn to reconsider & vacate ord of disml. pltf
4-29-86	pb	19.	Suppl opp of defts to the pltf's mtn to reconsider & vacate ord of disml. deft
4-29-86	pb	20.	ORD denying mtn for reconsideration.
5/15/86	TS	21.	PLTF E. FORREST NOTC OF APPEAL to 9th Cir. C/A frm ord ent 4/29/86. BILLED FOR DOCKET FEE.
9-23-86	me	22.	ORD mot for leave to appeal in forma pauperis denied, w/ out prej to renewal.
9-22-86	me		LODGED ORD US 9th C/A.